United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Court of Appeals, District of Columbia.

OCTOBER TERM, 1905.

No. 1580. 375

No. 12, Special Calendar.

TAYLOR KNOLL, APPELLANT,

vs.

UNITED STATES.

BRIEF FOR APPELLEE.

DANIEL W. BAKER,
United States Attorney for the District of Columbia.

JESSE C. ADKINS,
JAMES M. PROCTOR,
Assistant United States Attorneys.

JUDD & DETWEILER, (INC.) PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1905.

No. 1580.

No. 12, Special Calendar.

TAYLOR KNOLL, APPELLANT,

vs.

UNITED STATES.

Brief for Appellee.

STATEMENT.

The indictment in this case, which was filed March 10, 1905, charges the appellant with violating section 863 of the Code, the first count charging that he was concerned as an agent in managing a certain policy lottery and the second count charging him with having in his possession for the purpose of sale a chance in a certain policy lottery. He pleaded not guilty, and after a trial was convicted on the first count and acquitted on the second. (Rec., 1–3.)

On April 4 appellant moved in arrest of judgment upon the ground, among others, of the uncertainties of the indictment in its description of the crime. (Rec., 4.)

This motion being overruled, the prosecution introduced a witness who testified, over the objection and exception of the appellant, that the latter was commonly known as a promoter of policy. (Rec., 5, 6.)

Thereupon, on April 28, the appellant was sentenced to imprisonment in the penitentiary for a period of two years, from which judgment he prosecutes this appeal. (Rec., 4, 5.)

ARGUMENT.

The record in this case raises questions as to—

1. The sufficiency of the first count of the indictment.

2. The introduction of evidence as to the character of the defendant for the purpose of sentence.

I.

The Indictment is Sufficiently Certain.

Section 863 of the Code, under which this indictment was found, is as follows:

> "If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing any policy lottery or policy shop, or shall sell or transfer any ticket, certificate, bill, token, or other device purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize, to be drawn in any lottery, or in the game or device commonly known as policy

lottery or policy, or shall for himself or another person, sell or transfer, or shall aid in selling, exchanging, negotiating, or transferring a chance or ticket in or share of a ticket in any policy lottery or any such bill, certificate, token, or other device, he shall be fined not more than five hundred dollars or be imprisoned not more than three years or both."

The first count of the indictment charges in the language of the statute:

"That on divers days and times between the second day of January, in the year of our Lord one thousand nine hundred and five, and the seventeenth day of January in the year aforesaid, and at the District aforesaid, one Taylor Knoll, late of the District aforesaid, unlawfully was concerned as an agent in managing a certain policy lottery, a more particular description whereof is unknown to the Grand Jurors aforesaid; against the form of the statute in such case made and provided, and against the peace and Government of the said United States."

The appellant urges that this indictment is defective for several reasons, arguing:

First. That it does not state that the lottery is within the District of Columbia.

Second. That it is so uncertain in its description of the offense that the appellant could not know what he was to meet at the trial, and that it would not support a plea of former jeopardy.

1. The statute makes it an offense to be concerned in the District in the management of a lottery, and the

statute is violated whether the lottery itself be in or out of the District.

Under similar statutes, it has been held that the indictment need not show the location of the lottery.

13 Enc. Pl. & Pr., 391.
P. *v.* Charles, 3 Den. 212, 1 N. Y., 180;
P. *v.* Warner, 4 Barb., 314;
P. *v.* Sturdevant, 23 Wend., 418;
P. *v.* Noelke, 29 Hun., 461; 94 N. Y., 137, 143.
France *v.* State, 6 Baxter (53 Tenn.), 478.

The indictment here does charge that at the District of Columbia the appellant was concerned as an agent in managing a certain policy lottery, a better description of which is unknown. This is a sufficient allegation that the lottery was in the District.

The authorities cited on this point by appellant simply state the familiar rule in criminal pleading that no essential averment is to be taken by intendment.

In none of them is there raised a question of venue, nor is it said that under such a statute as the one under consideration here, it is necessary to show the location of the lottery.

2. As to the objection that the indictment is not sufficiently certain to enable the defendant to know what he is to meet at the trial, or to enable him to plead former jeopardy, it is enough to say that this indictment follows the approved precedents, and the form has in many cases been held to be good.

The offense of which the defendant is convicted is a

statutory misdemeanor, and it is said by the Supreme Court in U. S. *v.* Mills, 7 Peters, 142:

> "The general rule is that in indictments for misdemeanors created by statute it is sufficient to charge the offense in the words of the statute."

In 13th Enc. Pl. and Pr., citing many cases, this rule is said to be applicable to this offense.

To the same effect is 2 McLean Criminal Law, Sec. 1318.

In indictments for violating the Federal statutes prohibiting the use of the mails in aid of lotteries, or the transportation of lottery tickets in interstate commerce, the same rule is applied. See Pagin's Precedents, No. 310, et seq; U. S. *v.* Conrad, 59 Fed., 458, 462.

In Wharton's Cr. Pl. and Pr., Sec. 220, the rule is laid down:

> "On the general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be tried for really is."

The terms "lottery" and "policy lottery" have well defined meanings in popular usage, and the legislature must be assumed to have used them in the popular sense.

When, therefore, the indictment, following the statute, uses one of these terms the offense is individuated, and the defendant is as fully warned of the charge against him

as if an elaborate definition had been set forth in the indictment.

People *v.* Noelke, 29 Hun., 461; lottery.
France *v.* State, 53 Tenn., 478; lottery.
State *v.* Follett, 6 N. H., 53; lottery.
State *v.* Wilkerson, 170 Mo., 184; policy lottery.
Pickett *v.* P., 8 Hun., 83; policy lottery.
Dunn *v.* P., 27 Hun., 272; policy lottery.
P. *v.* Borges, 8 Abb. Pr., 132, 137; policy lottery.

In these cases the language of the indictments is substantially the same as that of the present indictment.

To the same effect are—

Com. *v.* Cooper, 5 Pick., 421;
Com. *v.* Horton, 2 Gray, 79;
Com. *v.* Harris, 13 Allen, 534;
Com. *v.* Sullivan, 146 Mass., 142.

In the last case the indictment charged, in the language of the statute, and in the language of the indictment here, the defendant with setting up and promoting lottery, and was held sufficient in an opinion rendered by Mr. Justice Holmes.

The case was followed with approval in Bueno *v.* State (Fla.), 23 Southern, 862.

See also—

Trout *v.* State, 111 Ind., 499;
Nichols *v.* State, 28 Ind. App., 674.

In Salomon *v.* State, 27 Ala., 26, the statute prescribed a form of indictment substantially like the one here.

Applying the same rule, it is held in indictments for selling lottery tickets unnecessary to particularly describe the tickets.

Dunn *v.* People, 40 Ill., 469;
Freleigh *v.* State, 8 Mo., 606, 613;
France *v.* State, 6 Baxter (53 Tenn.), 480;
Smith *v.* State, 68 Md., 168;
Boyland *v.* State, 69 Md., 511.

In other cases the indictment has been held sufficient where it described the offense generally and alleged inability to give a more particular description.

Whart. Crim. Law, Sec. 493;
People *v.* Taylor, 3 Denio, 96.

In France *v.* State, 6 Baxter, 478, *supra*, it is said that when former jeopardy is pleaded it is sufficient to show by the record that the pleadings were such in the first case that the same matter might have come in question on the trial, and then show by extrinsic evidence that it did in fact so come in question on that trial.

Under the rule as thus laid down, there can be no question that the indictment here would support a plea of former jeopardy.

State *v.* Wilkerson, 170 Mo., 192;
Pickett *v.* People, 8 Hun., 83.

The suggestion that under such an indictment a defendant might be tried for an offense other than the one for which he is indicted is answered by the foregoing cases.

It is remarkable that in only two of the cases cited by appellant on this point was involved an indictment for promoting a lottery.

In Com. *v.* Gillespie, 7 S. & R., 469, the indictment charging that defendant sold tickets in a lottery not authorized by law was held bad for not giving name of lottery and number of tickets sold. The statutory language does not appear in the report, nor does it appear that the name of the lottery was unknown.

In State *v.* Shorts, 32 N. J. Law, 402, the law prohibited lotteries for money or anything of value, etc., and the indictment was held bad for not stating that lottery was for money or a thing of value.

In Simmons *v.* U. S., 96 U. S. 360, a count charging that Simmons procured to be used a still for the purpose of distilling in a certain building where vinegar was manufactured, in violation of Sec. 3266 R. S., was held bad, because it did not allege the name of the person so procured, or that it was unknown, and because it did not appear that the vinegar was manufactured in the building at the time the still was so used.

Another count in the same indictment, under Sec. 3281, charging that defendant engaged in the business of a distiller with intent to defraud the United States was held good. There is practically no difference between this count and the indictment at bar.

In U. S. *v.* Hess, 124 U. S., 483, an indictment under Sec. 5480 R. S., for devising a scheme to defraud was held bad for not setting forth the scheme. Of course, without this description, the offense was not individuated.

It is respectfully submitted that the indictment here, following the express language of the statute, sufficiently individuates the offense; and that any possible doubt on the question is removed by the allegation of inability on the part of the grand jury to give a more particular description of the lottery.

II.

The Court Properly Heard Evidence as to Appellant's Reputation Before Passing Sentence.

The maximum penalty named in the statute for this offense is imprisonment for three years and a fine of five hundred dollars, while there is no minimum. In order that the trial justice may intelligently exercise this wide discretion as to the extent of punishment, and determine whether the convict will be sufficiently punished by a light fine, or whether he deserves the full penalty of the law, quite frequently more evidence is needed than is brought out at the trial. In the present case, for instance, evidence of the appellant's character while not admissible in chief, was a pertinent matter on the question of the length of sentence.

In 1 Bishop's New Crim. Law, Sec. 948, it is said:

> "The entire transaction in which a crime was committed may embrace more of wickedness than the indictment charges; or there may be other circumstances of aggravation, on the one hand, or of mitigation, on the other. Therefore, if the law has given the court a discretion as to the punishment,

> in pronouncing sentence it will look into any evidence proper to influence a judicious magistrate to make it heavier or lighter, yet not to exceed the limits fixed for what of crime is within the allegation and the verdict. Or this sort of evidence may be delivered to the jury at the trial, if with it is the assessment of the punishment. But we have authority for the proposition that in such a case the aggravating matter must not be of a crime separate from the one charged in the indictment—a rule perhaps not applicable where the court determines, after verdict, the punishment."

This practice is supported by all the authorities.

1 Bish. New Cr. Proc., Sec. 1294.
13 Encl. Pl. and Pr., 459.

In the recent case of Raymond *v.* U. S., 33 Wash. Law Rep., 514, this Court reversed the judgment of the Supreme Court of the District, because that court in imposing sentence had received evidence which this Court said was in continuation of the evidence adduced at the trial and which amounted to a retrial of the case without the presence of the jury. This Court said:

> " We believe that it is not unusual in the English practice, and not unknown in our American practice, that the court after verdict might examine into the prisoner's record, and even take testimony in regard to his previous character as a law-abiding citizen or the contrary, although we do not hold that such practice is proper in this jurisdiction.

It is to be remembered that the evidence complained of here was not admissible at the trial of the appellant,

and was not in continuation of the evidence adduced at the trial.

The following are some of the English cases in which this practice was followed, as said by this Court:

King *v.* Turner, 1 Strange, 139;
King *v.* Withers, 3 T. R., 428;
King *v.* Wilson, 4 T. R., 487;
King *v.* Sharpness. 1 T. R., 228;
Queen *v.* Gregory, 1 C. & K., 228; 47 E. C. L.
Queen *v.* Dignau, 7 A. & E., 593; 34 E. C. L., 316;
King *v.* Pinkerton, 2 East, 357.
King *v.* Buntz, 2 T. R. 683.

The practice is also recognized and adopted in several American cases:

People *v.* Cochran, 2 Johnson's Cases, 73:
State *v.* Smith, 2 Bay (S. C.), 62;
Kistler *v.* State, 54 Ind., 400, 403.

In State *v.* Summers, 98 N. Car., 702, 704, where evidence was introduced after a conviction of adultery, the Court disposed of the objection made here as follows:

> "Before judgment a number of witnesses of high character testified that the defendant was a man of bad character, his moral character being especially bad. It was competent for his Honor to hear such evidence as he might deem necessary and proper to aid his judgment and discretion in determining the the punishment to be imposed."

In Eastman *v.* State, 54 Ind., 441, where under the law the jury determined the punishment, the defendant plead guilty, and a jury was sworn, which heard the evi-

dence and determined the punishment. The defendant objected, but the practice was sustained.

Counsel for the Government have been unable to find any cases in which this proceeding was held erroneous.

The practice is supported even more strongly by reason than by the authorities.

In criminal cases the defendant's reputation and character are not admissible in evidence until made so by him. In such a case, is the court unable to inquire into the record of the defendant, and to impose sentence without knowing whether it is the convict's first or fiftieth offense?

In many cases the defendant pleads guilty and throws himself upon the mercy of the court. Is the court absolutely without power to listen to his plea, or to the facts and circumstances which extenuate and mitigate the offense?

We respectfully submit that the record fails to show any reversible error committed by the court below.

DANIEL W. BAKER,
United States Attorney for the District of Columbia.
JOHN C. ADKINS,
JAMES M. PROCTOR,
Assistant United States Attorneys.